

Moments in History

Commemorating Women's Role in Canadian History



Ontario
Women's
Directorate

2 Carlton Street
12th Floor
Toronto, Ontario
M5B 2M9

Issue 4 April 1993
The fourth in a series.

Women and the Charter of Rights and Freedoms

The month of April marks the anniversary of two significant dates related to the *Canadian Charter of Rights and Freedoms*. In 1982 the new Canadian constitution, including most of the Charter, came into effect; and in 1985, Section 15 with its equality guarantees came into force.

The Charter guarantees a variety of rights and freedoms and protects people in Canada from unwarranted government interference with these rights. Some of the rights and freedoms guaranteed are:

- the fundamental freedoms (such as freedom of conscience and religion);
- democratic rights (such as the right to vote);
- legal rights (such as the right to life, liberty and security of the person);
- equality rights.

Women Played a Role

While the Charter was being drafted, women were very active and forceful in lobbying for strong equality guarantees that would overcome the earlier failures of the common law and the Canadian Bill of Rights in this area. Section 15 of the Charter reads as follows:

15. (1) *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

(2) *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race,*

national or ethnic origin, colour, religion, sex, age or mental or physical disability.

What the section means is that all people are assured equal treatment under the law and that disadvantaged groups may benefit from laws specifically designed to bring about that equality.

For example, employment equity legislation, should be protected by Section 15(2) from a challenge by socially more advantaged persons based on Section 15(1) of the Charter.

Women also lobbied successfully to obtain a specific guarantee of gender equality which was enshrined in Section 28 of the Charter.

It states:

28. *Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

This section was sought to ensure that women receive full benefit of all Charter guarantees.

Where are We Today?

Today, the question continues to be asked: how much help can the Charter give women and other disadvantaged groups in their struggle for equality?

Some people working to gain equality argue that trying to do so by using the courts merely drains energy and resources that would be more usefully put to work in the political arena. They point to the meagre

resources of equality-seeking groups and the high costs of launching Charter challenges.

Without denying the truth of these statements, other women argue that we have made gains as a result of the Charter. Apart from cases litigated in court, the Charter has made governments review their legislation and policies with an eye to whether they are discriminatory. Furthermore, they must keep the Charter in mind when drafting new legislation.

The Women's Legal Education and Action Fund (LEAF) has intervened to make sex-equality arguments in many cases before the courts. Although few of the court decisions have been based on Section 15, or even Charter determinations, LEAF has been able to use the Charter's equality guarantees to successfully advocate for equality-promoting changes in the law.

For example, in a recent Supreme Court decision in a family law case (*Moge*), the Court determined that an ex-husband should continue to pay his ex-wife support indefinitely in spite of the fact that in recent years, the courts have tended to require wives to become self-supporting as soon as possible after marriage breakdown. In reaching this decision, the Court took into account LEAF's arguments about the impact of divorce on a woman's economic status, especially when the woman has been a long-term homemaker.

The current challenge faced by LEAF and other women's advocates is to develop an approach to cases involving intersecting (multiple) disadvantage. How do we argue cases of discrimination where the applicant is disadvantaged both as a woman and as a racial minority, or as a woman and as a person with a disability? We know that the disadvantage in such cases is compounded, but the courts have not as yet dealt with more than one ground of discrimination at a time.

Here are some precedent-setting Supreme Court cases which have used the Canadian Charter of Rights and Freedoms:

- In *Andrews v. Law Society of British Columbia*, a male applicant challenged the requirement that members of the Law Society be Canadian citizens. The decision was important for women and other equality-seeking groups in that it analyzed the purpose of Section 15 as intended to protect those groups that suffer political, legal or social disadvantage in our society. The decision also confirmed that other grounds of possible discrimination might be covered by Section 15 although they are not expressly listed there, for example, sexual orientation and marital status.
- The *Morgentaler* decision, in which the Supreme Court struck down the Criminal Code provision restricting the availability of abortion, was decided on the basis that it violated women's Section 7 Charter rights, dealing with life, liberty and security of the person.
- The *Schacter* case was a sex equality case brought by a man, who argued that he experienced discrimination because he was unable to get Unemployment Insurance benefits available to new mothers and adoptive parents of both sexes. The Supreme Court decision in this case focused on the ability of the courts to extend benefits where a law is under-inclusive.
- The *Symes* case, which deals with the deductibility of child care expenses from business income under the Income Tax Act, is the first sex equality case brought by a woman to be heard by the Supreme Court.
- In the *Butler* case, the accused was charged with selling obscene material and challenged the relevant sections of the Criminal Code based on the Charter guarantee of freedom of expression. The Supreme Court agreed that freedom of speech was infringed by the Criminal Code provisions, but upheld the law as being justifiable to avoid harm to society. Pornography was explicitly recognized by the court as potentially victimizing women.



Ontario
Women's
Directorate